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GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals of New York fundamentally misconstrued this Court's decisions in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and *Agostini v. Felton*, 521 U.S. 203 (1997), when it held that the creation of a public school district under a statute of general application employing neutral, legitimate educational criteria violates the Establishment Clause simply because the principal intended beneficiary of the statute is a municipality whose citizens are members of a single religious community.

LIST OF PARTIES

The parties to the proceeding below were:

Louis Grumet,
Caroline C. Shipley,

Plaintiffs-Respondents.

George Pataki, as Governor of the State of New York,
The New York State Education Department,
Richard P. Mills, as Commissioner of the New York State Education Department,
The New York State Board of Regents,
H. Carl McCall, as New York State Comptroller,
The Board of Education of the Kiryas Joel Union Free School District,
The Board of Education of the Monroe-Woodbury Central School District,
Dr. William J. Bassett, Jr., as District Superintendent of the Orange-Ulster BOCES,

Defendants-Appellants.

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No. 98-____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

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LOUIS GRUMET and CAROLINE C. SHIPLEY,

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, various officials and departments of the State of New York as well as the Boards of Education of the Kiryas Joel Union Free School District and the Monroe-

Woodbury Central School District, respectfully request that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, entered on May 11, 1999.

OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are not yet reported. They are reproduced at Pet. App. A, *infra*, pp. 1a-38a. The opinion of the Appellate Division, Third Department, of the Supreme Court of New York is reported at 244 A.D.2d 31, 675 N.Y.S.2d 662 (1998), and is reproduced at Pet. App. B, *infra*, pp. 39a-47a. The opinion of the Supreme Court for the County of Albany, New York, is unreported, and is reproduced at Pet. App. C, *infra*, pp. 48a-57a.

JURISDICTION

The decision of the New York Court of Appeals was issued on May 11, 1999. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

Section 1504 of New York's Education Law, added by Chapter 390 of the Laws of 1997, provides, in pertinent part:

> 3. Any municipality situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district may organize, pursuant to the provisions of this subdivision, a new union free school district consisting of the entire territory of such

municipality whenever required by the educational interests of the community.

a. No such new school district may be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; and (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality.

STATEMENT

This petition brings before this Court once more the Kiryas Joel Union Free School District, a public school district serving handicapped students in the Satmar Hasidic community of Kiryas Joel, New York. In 1994, a 6-3 majority of this Court held that the special legislation that originally created the Kiryas Joel School District was an unconstitutional establishment of religion because, the majority concluded, it singled out the Satmar religious community for special treatment rather than achieving the goal of accommodating the educational needs of the Satmar children through neutral, generally applicable statutory criteria. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994). Justices O'Connor and Kennedy, who provided the essential votes for the outcome, wrote separately to emphasize that a school district created for Kiryas Joel under a statute of general application employing neutral educational criteria would not be unconstitutional. *See id.* at 716-17 (O'Connor, J., concurring

in part and concurring in the judgment); *id.* at 728-30 (Kennedy, J., concurring in the judgment).

The New York legislature has now tried to do exactly what a fair reading of the opinions in *Kiryas Joel* would allow. It has passed a statute that permits any existing or future municipality to form its own school district provided only that the municipality satisfies a small number of legitimate criteria totally unrelated to religion. Kiryas Joel, which qualifies under the statutory criteria, has availed itself of this opportunity, and it has continued to operate its entirely appropriate, public educational program for students with special needs under the authority of this neutral statute of general application.

Despite the New York Legislature's attempt to conform the statute to the requirements of this Court's opinions in *Kiryas Joel*, a bare majority of the New York Court of Appeals has now held that the new law violates the Establishment Clause. Four judges of the court voted to strike down the statute even though they acknowledged that it is entirely neutral on its face, and that each of the criteria by which it determines whether a municipality may form its own school district advances legitimate, wholly secular educational concerns. Nonetheless, the court majority concluded that the law "has the primary effect of advancing one religion over others" because, in the majority's view, it disproportionately benefits the residents of Kiryas Joel and was intended to accommodate their interests. Pet. App. A, at 18a. Three judges of the Court of Appeals dissented vigorously. They said that the statute "does not have the effect of advancing religion," but "simply grants permission to any qualifying municipality to create its own public school district" based on "neutral secular criteria," with the ultimate end of providing assistance to "handicapped children in need of special, secular education." Pet. App. A, at 28a.

The majority of the New York court has seriously departed from applicable Establishment Clause principles and, in particular, from this Court's holdings in *Kiryas Joel* and in the Court's latest Establishment Clause decision, *Agostini v. Felton*, 521 U.S. 203 (1997). Indeed, the deviation from this Court's teachings is so great that summary reversal is warranted.

1. The Kiryas Joel School District Is Created

The events that led to this Court's *Kiryas Joel* decision are recited in detail in Justice Souter's opinion (*see* 512 U.S. at 690-96), and we summarize them briefly. Kiryas Joel is a village in Orange County, New York, all of whose residents are members of the Satmar Hasidic religious community, whom this Court described as "practitioners of a strict form of Judaism." *Id.* at 690. The village came into existence when the Satmars, who had settled in a subdivision of what was then the town of Monroe, took advantage of their right under New York's Village Law to form a new municipality. Because non-Satmars demanded that they not be included within the village's borders, the boundaries of the village were redrawn to coincide with those of the Satmars' property holdings.

Although a separate municipality, Kiryas Joel was still a part of the Monroe-Woodbury Central School District, a fact of limited significance to the majority of the Satmar children, who attend private religious schools. Those of the children who were handicapped, however, required and were entitled under state and federal law to receive special educational services from the public schools. When the Satmar children entered the Monroe-Woodbury public schools to receive those needed services, they experienced "panic, fear and trauma" (512 U.S. at 692) as a result of exposure to what they found to be a hostile school environment. Most Satmar parents felt compelled to withdraw their handicapped children from the public schools, and the special needs of the

children went unmet. Litigation in the New York state courts between the Satmar parents and the Monroe-Woodbury School District failed to resolve the problem. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 527 N.E.2d 767 (N.Y. 1988).

The New York Legislature responded to this serious problem in 1989 by enacting legislation constituting the village of Kiryas Joel as a separate school district. Kiryas Joel then created its own public school to provide special education and other education to its handicapped children. Handicapped children in neighboring school districts sought and received permission to attend Kiryas Joel's public school, and Orange County officials approved the public school's services for children throughout the county.

Two New York taxpayers who did not reside in Kiryas Joel or Monroe-Woodbury filed suit in the New York state courts, claiming that the creation of the school district violated both the Establishment Clause of the United States Constitution and the Blaine Amendment of New York's constitution. Expressly declining to reach the state constitutional issue, the New York Court of Appeals held by a 4-2 margin that the Kiryas Joel legislation violated the Establishment Clause because it was an "endorsement" of Satmar Hasidism that had the "primary effect" of "advanc[ing] religious beliefs." *Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 618 N.E.2d 94, 100 (N.Y. 1993). The court further ruled that the Legislature was forbidden to treat the Satmars as "entitled to special accommodation." *Id.* at 101.

2. This Court Decides *Kiryas Joel*

This Court affirmed in a 6-3 decision that produced six opinions. The lead opinion, written by Justice Souter, garnered a five-member majority for part of its analysis, but only a four-vote plurality for the remainder. The plurality

portion argued that New York had improperly conferred public authority on a religious community. The majority portion offered a narrower rationale, finding the "fundamental source of constitutional concern" presented by the case to be the legislature's granting of a special benefit to a single religious group, with "no assurance that the next similarly situated group seeking a school district of its own will receive one." 512 U.S. at 703. This departure from "neutrality as among religions" was, from the standpoint of the majority portion of Justice Souter's opinion, the decisive factor in the decision. *Id.* at 707. The opinion expressly differentiated the creation of the school district by special legislation (invalid) from the creation of the village itself pursuant to "the application of a neutral state law" (valid). *Id.* at 703, n.7.

By contrast to Justice Souter's opinion, Justice Scalia's dissent, which commanded three votes, found no constitutional flaw in the statute. To the dissenters, the New York Legislature was simply pursuing the legitimate secular purpose of providing educational opportunity to students with special needs through the creation and funding of a public school—a school that simply happened to have students who shared a common religion. 512 U.S. at 732-52 (Scalia, J., dissenting).

As between the diametrically opposed approaches of Justices Souter and Scalia, the balance was swung by Justice O'Connor, who formed the fifth vote for the majority portion of Justice Souter's opinion, and Justice Kennedy, who concurred in the judgment. Both Justices provided separate concurring opinions explaining their own reasoning in some detail. Both opinions stressed that the decisive factor was that the Kiryas Joel School District had not been created through the operation of a general statutory scheme that was neutral as among religious groups.

The critical passages in Justice O'Connor's concurrence read (512 U.S. at 716-17):

> On its face, this statute benefits one group—the residents of Kiryas Joel. Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification.
>
> * * *
>
> Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group.

Justice Kennedy's concurrence similarly indicated that it was the "forbidden manner in which the New York Legislature sought to go about" the otherwise "valid" goal of "accommodat[ing] the special needs of the handicapped Satmar children" that led him to vote to strike down the initial Kiryas Joel legislation. 512 U.S. at 722-23 (Kennedy, J., concurring in the judgment). What made the legislature's method "forbidden," in Justice Kennedy's view, was that it "use[d] religion as a line-drawing criterion." *Id.* at 728. By contrast, if the school district had been "formed pursuant to a religion-neutral" statute (as the Village of Kiryas Joel was formed), the district's creation would not, in Justice

Kennedy's view, have offended the Establishment Clause. *Id.* at 729-30.

3. The Legislature's First Attempt to Remedy the Constitutional Flaw

Within four days of this Court's decision, the New York Legislature passed (and Governor Cuomo signed) a new statute that sought to comply with the teachings of the *Kiryas Joel* opinions by providing a general set of neutral criteria under which municipalities such as Kiryas Joel could form their own school districts. The legislation (Chapter 241 of the Laws of 1994) provided that a municipality located within the boundaries of an existing school district could form its own separate district if it met requirements designed to ensure that the new district would have enough students and resources to sustain it, and if it would not take away too many students or resources from the existing district. The legislation, however, contained two peculiar features: It provided that the carving out of a new school district could not leave the existing school district with a *richer* per-pupil tax base than it had before, and it further specified that only existing municipalities, as opposed to new ones that might be created in the future, could take advantage of its provisions.

Kiryas Joel reconstituted its school district under the terms of Chapter 241 and continued the operation of its public school. Once again, the taxpayer plaintiffs filed a constitutional challenge. The trial court, finding the underlying statute to be a neutral law of general application, rejected the constitutional challenge. Ultimately, however, the New York Court of Appeals, in a unanimous opinion, disagreed. *See Grumet v. Cuomo*, 681 N.E.2d 340 (N.Y. 1997).

All the judges of the New York Court of Appeals said that some of the criteria defining the circumstances under which a municipality could form its own school district were

neutral and served legitimate educational purposes (*id.* at 347 (citations omitted)):

> A review of the statutory criteria shows some of them to be related to legitimate educational concerns. For example, the requirement that the existing school district and the new school district both comprise at least 2,000 students will reasonably ensure "a sufficient student base" for both districts to sustain their operations. Similarly, the qualification that a municipality cannot form its own district if its secession will reduce the population of the preexisting district by more than 60% would seem a legitimate means of protecting the preexisting district by "limit[ing] the percentage of the [preexisting district's] territory that could be lost if a municipality creates its own school district."
>
> Chapter 241's fiscal criteria, for the most part, also serve identifiable purposes. Requiring that the new district possess an actual valuation per total wealth pupil unit at least equal to the State-wide average (calculated roughly by dividing the district's total property value by the number of students) "ensure[s] that a sufficient property base exists to support school district operations." Moreover, the proviso that the creation of the new school district not reduce the per pupil wealth of the preexisting district by more than 10% is an appropriate way to protect a preexisting district from the potentially impoverishing effect of a wealthy municipality's secession.

The court unanimously held, however, that two of the statutory criteria did not serve legitimate purposes: (1) the provision that the creation of a new district could not *increase* the per pupil wealth of the preexisting district by more than 10%, and (2) the restriction limiting the benefits of the statute to municipalities existing at the time the

legislation was passed. *Id.* at 347-48. The effect of these provisions, together with the other statutory criteria, was to make Kiryas Joel the only municipality that qualified under the statute, and to make it extremely unlikely that any other municipality would ever qualify. *Id.* As a result, all the judges of the court held, "chapter 241 violates the Establishment Clause by effectively singling out the Village of Kiryas Joel for special treatment and thereby demonstrating impermissible governmental endorsement of this religious community." *Id.* at 342. None of the three parties that appeared separately in the 1994 litigation in this Court and that are now filing this joint petition sought review by this Court of the New York court's 1997 decision.

4. The Legislature Tries Again

During the three months that followed the court's ruling, the New York Legislature again wrestled with the problem of meeting the educational needs of Kiryas Joel's children while avoiding the flaws identified by the full Court of Appeals in the 1994 legislation. The Legislature ultimately adopted a straightforward solution. It enacted a law that conditioned a municipality's ability to form its own school district on satisfaction of only those criteria that the New York court had found to be legitimate, and it dispensed with the other limiting criteria. The result was Chapter 390 of the Laws of 1997, which permits any municipality wholly within the boundaries of an existing school district to form its own school district, as long as both the new and the old school districts will be left with at least 2,000 children, the new district's student population is no more than 60% of that of the existing school district, and the new district's per pupil wealth is equal to the statewide average. As an indication that the legislation was not designed solely to apply to Kiryas Joel, Governor Pataki's memorandum approving and signing it declared, as many legislators had believed, that 10 of the state's municipalities (including Kiryas Joel) would be

immediately eligible to form school districts under the legislation.

After passage of Chapter 390 in August 1997, Kiryas Joel again reconstituted its school district under the terms of the new law and has now operated its public school under the authority of Chapter 390 for nearly two full years. The school currently serves some 220 handicapped students, including students placed in the school by neighboring districts—not all of whom are Hasidic or even Jewish. The school's professional staff is not selected on the basis of religious affiliation, and there has never been any evidence that its curriculum includes inappropriate religious instruction. At no time has there been any evidence, or any allegation, that the Kiryas Joel public school has provided anything other than a program of appropriate instruction for students with special educational needs.

5. Four Judges of the New York Court Reject the New Statute

The taxpayer plaintiffs promptly filed yet another Establishment Clause case in the New York state courts, this one aimed at Chapter 390. On May 11, 1999, in a 4-3 split decision, the New York Court of Appeals rejected the New York Legislature's latest effort.

The majority acknowledged that Chapter 390 "sets forth facially neutral criteria" (Pet. App. A, at 11a), and the majority's opinion did not contest that (as it had previously held) *all* of those criteria were directly related to legitimate educational purposes. Nonetheless, four judges concluded that Chapter 390 was "not a neutral law of general application" (Pet. App. A, at 13a), because, contrary to what the Legislature and the Governor thought when the statute was enacted and signed, only two municipalities (Kiryas Joel and the Town of Stony Point) are currently indisputably eligible to form school districts under the statute. Although

there was no limit to the number of municipalities that could qualify in the future,[1] the majority concluded that "the statute's qualifying criteria are consciously drawn to benefit Kiryas Joel" (Pet. App. A, at 12a), and that "Chapter 390 violates fundamental Establishment Clause neutrality principles, it has the primary effect of advancing one religion over others and constitutes an impermissible religious accommodation." Pet. App. A, at 18a.

Three dissenters, including two judges who had joined the court's unanimous opinion striking down Chapter 390's predecessor, concluded that the Legislature's elimination of the flaws that had been found in the previous law rendered Chapter 390 a genuinely neutral statute aimed at the legitimate secular purpose of "redress[ing] a modern educational conundrum encountered by the Village of Kiryas Joel with respect to some of its neediest citizens, its handicapped children." Pet. App. A, at 23a.

The dissenters also pointed out that this Court's decision in *Agostini v. Felton*, *supra*, which held that the constitutionality of a state program could not be dependent on the relative numbers of religious and nonreligious groups it benefits, was flatly inconsistent with the majority's analysis. *See* Pet. App. A, at 24a-26a. The dissenters further rejected the majority's suggestion that the Legislature's persistence in its efforts to solve the problems of Kiryas

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[1] The Board of Education of Kiryas Joel submitted affidavits attesting that ten municipalities would immediately be able to form school districts under the law if they incorporated, and that many other possible municipalities could qualify in the future. The New York courts rejected this evidence because they concluded that the future eligibility of municipalities was somehow irrelevant or speculative. In its decision invalidating the 1994 law, by contrast, the New York Court of Appeals had found the law unconstitutional in large part because it prevented *future* municipalities from qualifying. It was not then suggested that the eligibility of future municipalities was too "speculative" to be part of the constitutional equation.

Joel's handicapped children somehow tainted the latest legislative solution.

The dissenters observed that the majority's decision showed that "Establishment Clause jurisprudence remains particularly conflicted," and they predicted that the case presented "a potential fact pattern for a second review by the Supreme Court of the United States." Pet. App. A, at 37a.

REASONS FOR GRANTING THE WRIT

I.
THE HOLDING OF THE NEW YORK COURT OF APPEALS IS DIRECTLY AT ODDS WITH THIS COURT'S DECISION IN *KIRYAS JOEL* AND ITS ESTABLISHMENT CLAUSE JURISPRUDENCE

In 1994, this Court addressed important principles of accommodation under the Establishment Clause when it decided *Board of Education of Kiryas Joel Village School District v. Grumet, supra*. These principles were subverted by the decision below. In striking down Chapter 390, the Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c).

1. Permissible Accommodation of Religious Needs.— This Court in *Kiryas Joel* unanimously reaffirmed the principle that accommodation of religious needs or concerns is permissible, and sometimes necessary, under the Establishment Clause. Although it struck down the statute creating the Kiryas Joel School District as a non-neutral accommodation of religious preferences, this Court, in the portion of Justice Souter's opinion that Justice O'Connor joined and that thus constituted the majority opinion, clarified that the well-established principles of accommodation remained undisturbed. Citing a long line of this Court's Establishment Clause jurisprudence, the majority expressly noted that "the Constitution allows the State to accommodate

religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." 512 U.S. at 705. The majority went so far as to suggest some permissible means by which the Legislature could accommodate the Satmar religious community's concerns, including through "general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings." *Id.* at 708.

The concurring opinions of Justice O'Connor and Justice Kennedy, as well as the dissent of Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) went even further in recognizing the validity of legislative accommodation of religious preferences. Justice O'Connor expressly stated that "[t]here is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation." *Id.* at 717. She noted that New York could "set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary." *Id.* And she stressed that "[a] district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group." *Id.* Likewise, Justice Kennedy wrote separately because of his "reservations about what the Court's reasoning implies for religious accommodations in general." *Id.* at 722. He underscored "the legislature's ability to respond to the unique problems of a particular religious group." *Id.* The dissenting Justices found the statute to be a constitutional accommodation within this nation's long tradition of religious toleration. *Id.* at 732, 742-47.

The majority in the Court of Appeals ignored these principles of accommodation when it invalidated Chapter 390 as having the primary effect of advancing or preferring one religion over others. The majority concluded that because only two municipalities (one of which is not a religious community) currently qualify under the generally applicable scheme of Chapter 390 to form school districts, and because the statute was an extension of past attempts to accommodate the Satmar community in particular, "the secular effect of the statute is virtually indiscernible." Pet. App. A, at 20a. This view that a neutral statute must fail because it reflects a legislative intent to assist the Satmar community turns this Court's Establishment Clause jurisprudence upside down. The one point of agreement among the opinions in *Kiryas Joel* was that accommodating the educational needs of the handicapped Satmar children was a legitimate, secular purpose. *See* 512 U.S. at 705-07 (Souter, J.); *id.* at 715-17 (O'Connor, J., concurring); *id.* at 723 (Kennedy, J., concurring); *id.* at 738 (Scalia, J., dissenting). All the Justices accepted the principle that even a legislative attempt to accommodate a particular religious community can serve as a valid and permissible basis for neutral legislation. *See id.* at 708 (Souter, J., for the Court) ("Nor do we impugn the motives of the New York Legislature, ... which no doubt intended to accommodate the Satmar community without violating the Establishment Clause."); *id.* at 717 (O'Connor, J., concurring) ("There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation."); *id.* at 724 (Kennedy, J., concurring) ("New York's object in creating the Kiryas Joel Village School District—to accommodate the religious practices of the handicapped Satmar children—is validated...."); *id.* at 743 (Scalia, J., dissenting) ("But even if Chapter 748 were intended to create a special arrangement for the Satmars *because* of their religion..., it would be permissible accommodation.").

2. The "Neutral Criteria" and "Generally Applicable" Standards of the Concurring Opinions.—In fact, Chapter 390, which the majority below struck down, is precisely the type of permissible legislative accommodation contemplated by the Court in *Kiryas Joel*. The key guideposts for determining what *Kiryas Joel* held are the concurring opinions of Justices O'Connor and Kennedy. Where the votes of concurring Justices are essential to the outcome of a case, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)); *see also O'Dell v. Netherland*, 521 U.S. 151, 160 (1997).

The "narrowest grounds" for the *Kiryas Joel* result are those set forth in Justice O'Connor's and Justice Kennedy's opinions. Justice O'Connor's opinion, as noted above, states expressly that a state law "may set forth neutral criteria that a village must meet to have a school district of its own" and that "[a] district created under [such] a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group." 512 U.S. at 717 (emphasis added). Similarly, Justice Kennedy's opinion makes clear that a statute that does not "use religion as a line-drawing criterion," *id.* at 728, but instead allows religious as well as non-religious groups to form governmental bodies "pursuant to a religion-neutral" procedure (*id.* at 729) is constitutional.

Chapter 390 undoubtedly satisfies the standards set forth in these opinions. It does not, either on its face or in practice, limit the ability to form a school district to a religious community. Rather, it relies solely on what even the New York Court of Appeals has recognized as facially neutral, educationally relevant criteria to determine whether a municipality may form a school district. That a religious community has benefited by the statute, and, indeed, that the

statute may have been motivated by the desire to accommodate the educational needs of the children of that community, cannot, under the decisive opinions in *Kiryas Joel*, make the statute or the resulting school district unconstitutional.

Similarly, the statute avoids the constitutional vice identified in the original Kiryas Joel legislation by that portion of Justice Souter's opinion that Justice O'Connor joined and that thus constituted a majority opinion. Unlike the statute that this Court struck down, Chapter 390 provides the necessary "assurance that the next similarly situated group seeking a school district of its own will receive one." 512 U.S. at 703. If a group satisfies the religiously neutral criteria set forth by the statute (which were ratified by the unanimous Court of Appeals in 1997 as "related to legitimate educational concerns"), Chapter 390 gives that group the same right as Kiryas Joel to form its own school district. If a group is unable to satisfy those neutral, legitimate and non-exclusionary criteria, it cannot be called "similarly situated" in any legally relevant sense. Thus, Chapter 390 in no way singles out Kiryas Joel for a forbidden religious preference over other similarly situated groups.

3. Conflict with *Agostini v. Felton*.—The New York court's rejection of Chapter 390 also rests on premises irreconcilable with this Court's more recent decision in *Agostini v. Felton*, 521 U.S. 203 (1997). *First*, the majority's view that the statute has a "primary effect of advancing religion" simply because a community of religious believers benefits from the statute disregards *Agostini*'s central holding: A law does not have the "primary effect of advancing religion" merely because believers are advantaged by it. The *Agostini* opinion could hardly have been clearer on this point: "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." 521 U.S. at 229. *Second*, in *Agostini*,

the Court made clear that providing educational assistance to sectarian students is a legitimate government purpose, as long as "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231. That is precisely what Chapter 390 does.

Finally, the decision of the majority of the Court of Appeals adds an unprecedented and disturbing element to existing Establishment Clause jurisprudence that further restricts what would otherwise be permissible accommodation. The majority below held that since this Court decided *Agostini*, there were now other ways, short of the statute at issue, to solve the problems of educating the handicapped children of the Village of Kiryas Joel. In the majority's view, Chapter 390 was not necessary and, therefore, "would likely be perceived as a religious preference in light of the arguably constitutionally permissible alternative *Agostini* has provided." Pet. App. A, at 21a.

There is no precedent for imposing a least-restrictive-alternative test in assessing the means the legislature chooses to accommodate burdens on the exercise of religion. While the parties might conceivably opt to resume their former practice of sending public school employees into the religious schools to deliver secular services, the legislature is not constrained from accommodating their needs by means of a generally applicable law containing neutral criteria. Moreover, *Agostini permits*, but does not *require*, the pre-*Aguilar* practice. There is no assurance that the Monroe-Woodbury Central School District would be willing to provide at Kiryas Joel's religious schools the accommodation *Agostini* now permits. The existence of another possible avenue of relief that a local school district may wish not to pursue cannot transform a legitimate legislative choice into evidence of an impermissible preference. To impose this

unprecedented and novel requirement is not only an unwarranted and improper restriction on accommodation, but it would encourage the further intrusion of the judiciary into the realm of the legislature.

II.
THE ISSUE IS IMPORTANT

It is unusual, though far from unheard of, for this Court to address the same controversy twice. *See, e.g., Agostini v. Felton, supra*; *Aguilar v. Felton*, 473 U.S. 402 (1985); *United States v. Richman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). When a State has enacted a new law correcting constitutional flaws found by this Court in a statute, the Court has not hesitated to review and uphold the corrective legislation. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976) (approving constitutionality of death penalty legislation replacing that struck down in *Furman v. Georgia*, 408 U.S. 238 (1972)); *Planned Parenthood of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) (upholding a parental notice/judicial bypass abortion regulation replacing the parental notice provision struck down in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976)). The importance of the issues presented by this case places it in the company of cases that deserve further consideration by this Court, whether through summary disposition, as we suggest, or plenary review.

It is always a matter of importance when the United States Constitution is invoked to strike down and enjoin the operation of a presumptively constitutional statute duly enacted by the legislature of a State. Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of

irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, 1977).

Here, the importance of the matter is more than merely theoretical. The education of the handicapped children of Kiryas Joel is a problem that has challenged the New York Legislature for a decade. The Legislature's repeated efforts to come up with a creative and constitutional solution indicate the significance of the matter to the elected representatives of the people of New York, as well as to the community of Kiryas Joel and its immediate neighbors.

The issues presented have a broader importance as well. Establishment Clause cases, because of their significance in defining the nature of our government and its relationship with the people, have rightly commanded considerable attention from the Court in recent years. The importance of this particular controversy is reflected in the substantial commentary that this Court's decision in the *Kiryas Joel* case produced in legal and popular journals.[2] Moreover, the reasoning underlying the New York court's resolution of this latest phase of the controversy, if permitted to stand, could have substantial effects on future state and federal legislation and on similar issues affecting public schools in other States.

For example, a recent amendment to the Medicare and Medicaid Acts has set forth criteria under which "religious non-medical health care institutions" may participate in the Medicare and Medicaid programs. An earlier version of this legislation, which singled out "Christian Science sanitoria"

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[2] *See, e.g.*, Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996); Alison Wheeler, *Separatist Religious Groups and the Establishment Clause -- Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994)*, 30 HARV. CIV. RIGHTS & CIV. LIB. L. REV. 223 (1995); Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L. J. 433 (1995); Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L. J. 1 (1995).

by name for special treatment, was held unconstitutional by a federal court under the Establishment Clause. *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996). But subsequent legislation, which set forth generic criteria governing such institutions, was upheld by the same court *even though Christian Science sanitoria were the only extant institutions that met those criteria. Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, Civ. No. 97-1794 (ADM/JGL) (D. Minn. July 24, 1998).[3] The court rejected the argument that the revised legislation singled out a particular religious group for disparate treatment, holding that "it may not be assumed that 'there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position.'" *Id.*, slip op. at 16 (quoting 938 F. Supp. at 1480). Of course, under the analysis adopted by the New York Court of Appeals, the federal legislation would be doomed.

Similarly, the analysis of the New York court's majority would necessitate a different outcome in *Stark v. Independent School Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998). That case concerned a school that had been established in a small Minnesota community to accommodate the needs of a tiny sect called the Brethren. Although the establishment of the school and the modification of its instructional program to grant exemptions from the use of technology that offended the Brethren were based on neutral policies of the school district and the State, the school clearly benefited the Brethren. Indeed, all the school's students were members of the Brethren. Even so, the Eighth Circuit held that the establishment and operation of the school did *not* have the primary effect of advancing religion. *Id.* at 1073-75. Because the neutral policies underlying the school's creation did not specifically single

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[3] Copies of the district court's unreported decision have been lodged with the Clerk.

out the Brethren for special treatment, the Eighth Circuit ruled that the school was a permissible accommodation. *Id.* at 1075-76. Under the reasoning of the New York court's majority, by contrast, the disproportionate benefit flowing to the Brethren would have condemned the school to constitutional oblivion.

Finally, there are important institutional interests for this Court. This matter was significant enough for this Court to take up once. No fewer than six of the members of this Court issued written opinions. The case, accordingly, is important enough to justify making sure that the guidance given by the Court is followed, rather than evaded or ignored. By the same token, if the opinions issued by this Court are to be given an interpretation other than that which follows naturally from their plain words, it should be this Court, not the New York court, that so decides.

III.
SUMMARY REVERSAL IS APPROPRIATE

The decision rendered by the four-judge majority of the New York Court of Appeals so far departs from the clear teachings of this Court's two most relevant and recent decisions (*Kiryas Joel* and *Agostini*) that correction of the error is warranted. Indeed, the majority's disregard for this Court's opinions merits summary reversal. *See, e.g., Stewart v. LaGrand*, 119 S. Ct. 1018 (1999); *Pounders v. Watson*, 521 U.S. 982 (1997); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Mireles v. Waco*, 502 U.S. 9 (1991); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988). As this Court has recognized, "summarily set[ting] aside unsupportable judgments" is particularly "appropriate when what is at issue is the total invalidation of a statewide law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). This is no less true when a state court has erroneously invalidated a state law on federal grounds than when a federal court has done so. *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The decision of the New York Court of Appeals may be summarily reversed.

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